

Domestic Relations Committee
Judicial Conference of Indiana

Minutes
July 16, 2004

The Domestic Relations Committee met at the Indiana Judicial Center in Indianapolis, Indiana on Friday, July 16, 2004 from 10:30 a.m. – 3:30 p.m.

1. Members present. David A. Ault, David C. Chapleau, Thomas J. Felts, Mary Margaret Lloyd, Robyn L. Moberly, Nicholas L. South, and Michael P. Scopelitis, Chair.
2. Staff present. Jeffrey Bercovitz provided the committee with staff assistance.
3. Guests present. Lindsey Borschel, Division of State Court Administration; Tom Godwin, law clerk for Allen Circuit Court, and Donna Bays, Chair, Family and Juvenile Law Section, ISBA were present.
4. Minutes approved. The minutes from May 21, 2004 were approved.
5. Intranet. Lindsey Borschel gave a demonstration of an intranet product recently purchased by the Division of State Court Administration, Judicial Technology and Automation Committee entitled, “Angel.” This product will permit committee members to exchange drafts of benchbook sections and provided other services. The committee agreed to test this product and provide feedback.
6. Child Support calculator.
 - a. Judge Scopelitis reported the Child Support Bureau, FSSA, contacted him because the online calculator does not compute support for 6, 7 and 8 children. The Child Support Guidelines provide a formula for support of 6,7, or 8 children above \$4,000 weekly only. He agreed to call Karla Mantia, Director, Child Support Bureau, to discuss how ISETS is calculating child support with 6, 7, and 8 children now and what Title IV-D prosecutors are doing in this area. The committee agreed the online and offline calculators should be the same and not calculate support for more than five children below \$4,000 weekly income.
 - b. Committee members agreed to change the wording in Step 2 of the Adjustment for Subsequent Children to add “living in the household;” and to remove the “Wizard” and “Quik-Add” language from instructions for the online calculators.
 - c. Lindsey Borschel reported she was contacted by ICLEF to make a presentation on the calculators on December 14 for 30-45 minutes along with an attorney. Committee members agreed Judge Moberly would attend this session to report back any questions of interest.
 - d. Members of the committee discussed a presentation about the calculator at the September Judicial Conference. Judge Scopelitis will make the presentation with Lindsey Borschel. He agreed to show a calculation under the online and offline versions of the calculator. They requested an Internet connection for the presentation.
7. Attorney withdrawal from dissolution case. Judge Felts reported a member of his local bar asked for a resolution of a concern about the withdrawal of an attorney from a dissolution case. The concern was brought to the forefront by Opinion No. 3 of 2003 of the Legal Ethics

Committee of the Indiana State Bar Association. The committee agreed to take no action on this matter believing it to be more of an attorney ethical question.

8. Payment of support to noncustodial parent. Jeff Bercovitz distributed an email from Judge Meier who described an instance where ISETS would not send a check from the custodial parent to the noncustodial parent when a parenting time credit is involved under the guidelines. This payment is possible with the parenting time credit. Judge Scopelitis agreed to contact Karla Mantia about this issue.

9. Domestic Relations Benchbook.

a. Committee members agreed to use the following format to prepare each chapter of the Domestic Relations Benchbook, in addition to the format agreed on in May:

(1) Use “*Berthlholet v. Berthlholet, 725 N.E.2d 487 (Ind. Ct. App. 2000)*” italics, rather than bold indicated in May, for all case citations. Always use complete case citation.

(2) Use bold for headings only.

(3) Use justify for the left margin only. The right margin will not be justified.

(4) Use a summary of a statute and include the statute’s citation. Do not quote the entire statute.

c. Committee members agreed to revise the May assignment for the August meeting in accordance with the May minutes, the directions above, and as illustrated by the assignment of Judge Scopelitis (Attachment No. 1). The following is the assignment for each committee member, **for the Provisional Orders portion of the outline:**

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|--|-------------------------------------|
| 1. Custody | Judge Ault and Judge Bonfiglio |
| 2. Visitation | |
| 3. Intro to Provisional Orders, Support, and Modification | Judge Scopelitis and Mag. Chapleau |
| 4. Property | Judge Felts and Judge LaViolette |
| 5. Debts | |
| 6. Temporary Maintenance | Judge Lloyd and Judge Meier |
| 7. Family Violence Issues and Temporary Restraining Orders | |
| 8. Attorney fees and other litigation expenses | Judge South and Judge Striegel |
| 9. Temporary Restraining Orders | Judge McGillivray and Judge Moberly |
| 10. Custody, visitation and Emergency Custody Requests relationship between them | |

d. Committee members reviewed the following schedule for completion of assignments:

LaViolette, Felts

August 20, 2004

Ault, Scopelitis	October 15, 2004
Chapleau, Moberly	November 19, 2004
Lloyd, McGillivray	January 21, 2005
South, Meier	February 18, 2005
New judge, Bonfiglio	March 18, 2005

10. Court ADR program. Committee members discussed revisions of the statutory language for this program. Judge Felts agreed to discuss with Leslie Rogers any revisions, which may be needed. Jeff Bercovitz agreed to discuss with Leslie Rogers a reminder letter about statistics for this program to be forwarded to all courts participating in the court ADR program.

11. Next meeting. Committee members agreed to meet again on the following dates: August 20, October 15, November 19, 2004 and January 21, February 18, March 18, April 15, and May 20, 2005 from 10:30 to 4:00 p.m. at the Indiana Judicial Center.

Respectfully submitted,

Jeffrey Bercovitz, Director
Juvenile and Family Law

DOMESTIC RELATIONS BENCHBOOK

III. DISSOLUTION

B. Provisional Orders – Introduction to Provisional Orders

Purposes of a Provisional Order:

A provisional order is intended to provide temporary relief and assistance to the parties during the pendency of an action for dissolution of marriage under **Ind. Code § 31-15-2** or legal separation under **Ind. Code § 31-15-3**. It is designed to maintain the status quo of the parties by prohibiting or requiring certain conduct and actions by them. *Berthlholet v. Berthlholet*, 725 N.E. 2d 487 (Ind. Ct. App. 2000).

Authority to Issue a Provisional Order:

Issuance of a provisional order is authorized under **Ind. Code §§ 31-15-4-1** through **31-15-4-15**.

Triggering Mechanism:

Either party may file a motion seeking various types of temporary relief or assistance to help maintain the status quo at any time after dissolution of marriage or legal separation action has commenced. **Ind. Code § 31-15-4-1**.

The motion must be accompanied by an affidavit setting forth the factual basis for the motion and specifying the relief sought. **Ind. Code § 31-15-4-2**.

Hearing Required:

A motion for provisional relief must be set for hearing and requests for temporary child support or child custody shall be immediately scheduled. **Ind. Code § 31-15-4-4** and **Ind. Code § 31-15-4-5**. Exception: the court may issue a temporary restraining order if the court finds on the basis of the moving party's affidavit that injury would result to the moving party if an immediate order is not issued. **Ind. Code § 31-15-4-7**, Trial Rule 65, and *In Re Anonymous*, 786 N.E.2d 1185 (Ind. 2003). [Note: add Jud. Qualifications Opinion in this area]

Types of Relief Available:

In general, the following areas of temporary relief and assistance can be requested by either party and provided by the trial court:

- a. Child legal and physical custody. **Ind. Code § 31-15-4-1(a)(2)** and **Ind. Code § 31-15-4-8(b)**;
- b. Child parenting time. **Ind. Code § 31-15-4-1(a)(2)**, **Ind. Code § 31-17-4-1** through **Ind. Code § 31-17-4-10** and Indiana Parenting Time Guidelines.
- c. Child Support. **Ind. Code § 31-15-4-1(a)(2)**, **Ind. Code § 31-15-4-8**, **Ind. Code § 31-16-6-1** through **Ind. Code § 31-16-6-7** and Indiana Child Support Rules and Guidelines.
- d. Evaluations and reports to the court by either an independent investigative agency and/or by psychiatrists, psychologists, and/or therapists regarding temporary and permanent child custody and parenting time. **Ind. Code § 31-17-2-12**.
- e. Spousal Maintenance. **Ind. Code § 31-15-4-1(a)(1)**, **Ind. Code § 31-15-4-8(a)**.
- f. Exclusive occupancy of marital residence or other buildings and structures. **Ind. Code § 31-15-4-1(a)(3)** and **Ind. Code § 31-15-4-8(b)(3)**.
- g. Exclusive use of property (e.g., cars, boats, furniture, etc.). **Ind. Code § 31-15-4-1(a)(3)**, **Ind. Code § 31-15-4-3(2)**, and **Ind. Code § 31-15-4-8(b)(3)**.
- h. Temporary Restraining Order/Preliminary Injunction relating to protection and preservation of assets. **Ind. Code § 31-15-4-3**, **Ind. Code § 31-15-4-8(b)(1)**, and Indiana Trial Rule 65(e).
- i. Counseling for the marriage, the parties and/or the children. **Ind. Code § 31-15-4-9** and **Ind. Code § 31-15-4-10** (cannot require joint counseling without consent or if pattern of domestic or family violence is demonstrated).
- j. A protective order under **Ind. Code § 34-26-5**.
- k. Attorneys' fees and other litigation expenses. **Ind. Code § 31-15-10-1**.
- l. Conciliation and mediation. **Ind. Code § 31-15-9-1**, **Ind. Code § 31-15-9.4-1** through **Ind. Code § 31-15-9.4-2**.
- m. Guardian ad Litem or Court Appointed Special Advocate (CASA) or both. **Ind. Code § 31-15-6-1**.
- n. Allocation of liabilities and other appropriate relief designed to maintain the status quo of the parties.

Standard of Proof:

In general, a trial court may enter a provisional order based upon a showing of facts appropriate to a determination of the issues presented. The terms of a provisional order must be just and reasonable and supported by the evidence. **Ind. Code § 31-15-4-8(a), Ind. Code § 31-15-4-9, and Ind. Code § 31-15-4-15.**

A provisional order will be reversed only upon a showing of an abuse of discretion. *Klotz v. Klotz*, 747 N.E.2d 1187 (Ind. Ct. App. 2001). Where the trial court's decision is based upon specific findings and conclusions it will be reversed only when found to be clearly erroneous. *Klotz, supra*, and *Law v. Law*, 676 N.E.2d 771 (Ind. Ct. App. 1997).

Time Limit for Decision:

The court shall determine, after hearing on the motion for provisional relief and not later than twenty-one (21) days after the motion is filed, whether to grant or deny the motion. **Ind. Code § 31-15-4-6.**

Modification or Revocation of Provisional Order:

A provisional order may be revoked or modified before a final decree is entered on a showing of facts appropriate to revocation or modification. **Ind. Code § 31-15-4-15. Ind. Code § 31-15-4-15** does not require a written motion and sets forth no time limits for modification of a provisional order. Therefore, it would not be an abuse of discretion to modify a provisional order on oral motion of a party. *L.D.H. v. K.A.H.*, 665 N.E.2d 43 (Ind. Ct. App. 1996) (referring to **Ind. Code § 31-15-11.5-7(f)** repealed, re-enacted but not substantively changed in 1997 by **Ind. Code § 31-15-4-15** and finding no abuse of discretion when the trial court considered the best interests of the children and determined that the facts favored modification of the provisional order). However, see *Loeb v. Loeb*, 245 N.E.2d 831 (Ind. 1969) (our supreme court decided that modification of a pendente lite support order in the absence of changed circumstances was an abuse of discretion).

Contempt Power:

A provisional order is enforceable by the trial court's use of its contempt power. **Ind. Code § 31-16-12-1, Ind. Code § 31-17-4-8**, *Mosser v. Mosser*, 729 N.E.2d 197 (Ind. Ct. App. 2000), *Jenkins v. Jenkins*, 687 N.E.2d 256 (Ind. Ct. App. 1997), *trans. denied*, and *Welling v. Welling*, 257 Ind. 120, 134, 272 N.E.2d 598, 606 (Ind. 1971).

Termination of a Provisional Order:

A provisional order will terminate when a final decree is entered or the dissolution or legal separation action is dismissed. **Ind. Code § 31-15-4-14**. This means that a provisional order is merged and extinguished in the final decree. *Mosser v. Mosser*, 729 N.E.2d 197 (Ind. Ct. App. 2000) and *Dillion v. Dillion*, 696 N.E.2d 85 (Ind. Ct. App. 1998) (order setting temporary spousal maintenance and child support “merges” into final decree). Nevertheless, an obligation secured prior to the final decree survives. *Crowley v. Crowley*, 708 N.E.2d 42, 57 (Ind. Ct. App. 1999) (trial court authorized to order payment of arrearages accumulated prior to entry of decree under provisional order). See also *DeMoss v. DeMoss*, 453 N.E.2d 1022, 1025 (Ind. Ct. App. 1983) (husband liable for support payments since pendente lite order was neither revoked nor modified prior to final decree). [NOTE: Any support arrearages should be preserved in the final decree.] [NOTE: See also provisional support enforced by the Title IV-D prosecutor:_____]

Short of either the entry of a final decree or the dismissal of a dissolution or legal separation action, the duration of a provisional order is committed to the sound discretion of the trial court. *Crowley v. Crowley*, 708 N.E.2d 42 (Ind. Ct. App. 1999). Also see *Caster v. Caster*, 333 N.E.2d 124 (Ind. Ct. App. 1975) (limiting a spousal maintenance order to eight weeks not error).

No Prejudice to Final Order:

Issuance of a provisional order is without prejudice to the rights of the parties or the child as adjudicated at final hearing. **Ind. Code § 31-15-4-13**. In other words, it would be inappropriate for a trial court to enter an award in a final decree or order solely because it had entered a similar temporary award in a provisional order. See *Trost-Steffin v. Steffin*, 772 N.E.2d 500 (Ind. Ct. App. 2000) (regarding award of temporary and permanent custody).

Despite the temporary nature of a provisional order, such orders are vitally important because they do set basic legal boundaries within which the parties are to function during the pendency of the dissolution or legal separation action. In some cases, precise and well-crafted provisional orders will mean the difference between order and chaos for the parties.

Appealing a Provisional Order:

Provisional orders are appealable interlocutory orders as a matter of right. Thus, appeal of provisional orders is waived at the time of the final judgment. *Dillion v. Dillion*, 696 N.E.2d 85 (Ind. Ct. App. 1998) and *Burbach v. Burbach*, 651 N.E.2d 1158, 1162 (Ind. Ct. App. 1995).

Enforcement of Provisional Order After the Death of a Party:

When a party dies prior to the granting of either a dissolution decree or legal separation decree, the cause of action dies, as does the provisional order. *Fitzgerald v. Fitzgerald*, 567 N.E.2d 159 (Ind. Ct. App. 1991). Also see *Brown v. Guardianship of Brown*, 775 N.E.2d 1164 (Ind. Ct. App. 2002).

Motion for Change of Venue or Change of Judge:

Such motions filed by either party before the court rules upon a provisional relief motion do not divest the court of jurisdiction to conduct a provisional hearing and set temporary child support, temporary custody, and parenting time. **Ind. Code § 31-15-4-11.**

If a motion for change of venue or change of judge is granted after a provisional relief order is entered, either party may, upon motion, request a subsequent provisional relief hearing on temporary child support, temporary custody, and parenting time, seek to modify or revoke the prior provisional relief order(s) or seek and request a hearing on any other form of temporary relief available. **Ind. Code § 31-15-4-12.**

[Note: Add something about T.R. 76 to avoid change of judge]

Attachment No. 1

